

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF ILLINOIS  
BENTON DIVISION

MIGUEL HERNANDEZ,	)	Case No. 18-CV-01946-SMY-DGW
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
BC SERVICES, INC.,	)	
	)	
Defendant.	)	

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**MOTION TO STRIKE AMENDED COMPLAINT**

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COMES NOW, Defendant, BC Services, Inc. ("BCS"), by its counsel, pursuant to Fed. Rule Civ. Pro. ("F.R.C.P.") 12(f)(2) and hereby moves this honorable Court for an order striking the Plaintiff's Amended Complaint for failure to comply with F.R.C.P. rules 7 and 15 and SDIL-LR 15.1, and as grounds therefore states as follows:

CERTIFICATE OF CONFERRAL

Undersigned counsel has conferred with counsel for Plaintiff prior to filing this motion. Plaintiff's counsel indicated that Plaintiff does not take a position with regard to the motion, however Plaintiff would not agree to withdraw the Amended Complaint.

PROCEDURAL POSTURE

On October 12, 2018, the Plaintiff filed his Complaint. (Doc. 1). On October 15, 2018, BCS executed a Waiver of Service. (Doc. 6). Per F.R.C.P. 12(a)(1)(A)(ii) the deadline for BCS to answer or otherwise respond was December 14, 2018. A week prior to that response deadline, BCS filed its 12(b)(6) Motion to Dismiss for Failure to State a Claim on December 7, 2018. (Doc. 10). Pursuant to SDIL-LR 7.1(c)(1), Plaintiff

has until January 10, 2019 to file a response to BCS' Motion to Dismiss.<sup>1</sup> Without conferral with counsel for BCS, nor alerting the Court, Plaintiff filed his Amended Complaint directly into the case via ECF on December 18, 2018. (Doc. 11).

### APPLICABLE LAW

F.R.C.P. 7(a) sets forth the pleadings that may be filed in a Federal civil matter. The Rule 7(a) list is exhaustive. *A. Bauer Mech., Inc. v. Joint Arbitration Bd. of Plumbing Contractors' Ass'n & Chicago Journeymen Plumbers' Local Union 130*, 562 F.3d 784, 790 (7<sup>th</sup> Cir. 2009). A party attempting to file beyond the pleadings enumerated in Rule 7(a) should file a motion pursuant to Rule 7(b). *Id.* F.R.C.P. 15(a) governs the filing of an amended pleading. A party seeking leave to amend must, inter alia, submit a proposed amendment to the court. A court has no obligation to grant leave to amend where the plaintiff has not made a request to amend or does not show how defects in existing complaint will be cured. *Haywood v. Massage Envy*, 887 F.3d 329 (7<sup>th</sup> Cir. 2018).

In this District, Local Rule 15.1 sets forth the procedure by which parties shall seek to amend their pleadings. Rule 15.1 states as follows, in part:

A proposed amendment to a pleading or amended pleading itself must be submitted at the time the motion to amend is filed. Proposed pleadings must be submitted in accordance with CM/ECF User's Manual Section 2.10 titled 'Submitting a Proposed Document.'

Section 2.10 provides that proposed orders, **proposed amended complaints** ... require court approval before actually being filed and given full effect." (emphasis added)

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<sup>1</sup> The deadline appears in the ECF full docket text for the Motion to Dismiss, Doc. 10, and is automatically generated in the ECF system upon the filing of the motion.

A valid local rule has the effect of law, and must be obeyed. *Hollingsworth v. Perry*, 558 U.S. 183, 191 (2010); *Frakes v. Peoria Sch. Dist. No. 150*, 872 F.3d 545, 549 (7<sup>th</sup> Cir. 2017). Compliance with Local Rule 15.1 is expected when seeking to amend a complaint. *Burke v. Ethyl Petroleum Additives, Inc.*, 359 F.Supp.2d 726, 731 (S.D. Illinois 2005).

### ARGUMENT

Plaintiff has filed an Amended Complaint directly through the Court's ECF system (at Doc. 11 ) without having followed SIL-LR 15.1. The Rule refers litigants to the ECF User Manual section 2.10, which directs that proposed amended complaints "require court approval before actually being filed" and thus, "such documents must be attached to an email sent to the email address of the assigned judge." As it sets forth the exclusive procedure for seeking leave to file an amended complaint, by its' operation Rule 15.1 prohibits a direct filing via ECF into a pending case. Plaintiff has not identified any exemption to the rule, nor has Plaintiff offered an argument as to why the rule should not apply in this instance.

Rule 15.1 serves a valid purpose, and disregarding it here will prejudice BCS. Specifically, there is no order regarding the Amended Complaint, and therefore the parties are struggling to come to agreement on procedure and timeframes that govern the pleadings and procedure going forward. For instance, is the filing of the Amended Complaint in this fashion sufficient to render the Motion to Dismiss invalid? Must BCS file an Answer, or will a renewed Motion to Dismiss be permitted, and with what deadlines? These issues are already recognized by the Court as a valid reason for following the Rule 15.1 procedure. "[T]o prevent confusion, such documents must be

attached to an e-mail sent to the e-mail address of the assigned judge.” SDIL Chambers procedures for Submitting a Proposed Document, Found at <https://www.ilsd.uscourts.gov/Judges.aspx> last accessed December 27, 2018.

More importantly, BCS has reviewed the Proposed Amended Complaint carefully, and it does not appear to present new or additional facts, nor claims, that materially change the claims that are set forth in the operative Complaint. Rule 15.1 goes a long way to resolving these issues in an efficient, non-prejudicial fashion.

The purpose of Rule 15.1 is readily apparent. With the benefit of Rule 15.1, the Court and parties are afforded an opportunity to review the new material (which must be underlined) to ascertain whether the proposed amendment cures defects, presents new or changed facts, would materially alter the litigation, or whether the amendment is interposed for a proper purpose. Compliance with Local Rule 15.1 is expected when seeking to amend a complaint. *Burke v. Ethyl Petroleum Additives, Inc.*, 359 F.Supp.2d 726, 731 (S.D. Illinois 2005).

As additional authority for granting this request to strike the Plaintiff’s improperly filed amended complaint, BCS relies upon this Court’s Case Management Procedures (“CMP”).<sup>2</sup> Therein, the Court has already advised the parties that, “Judge Wilkerson requires adherence to the Local Rules except in rare cases, of which he will directly advise parties. **Therefore, questions about Local rules and procedures covered by such Rules should be addressed by reading the Rules....**” (emphasis in original).

All attorneys with a federal practice are generally presumed to possess a working familiarity with how litigation is fairly conducted under the Federal Rules of Civil

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<sup>2</sup> Found at <https://www.ilsd.uscourts.gov/documents/Wilkerson.pdf> last accessed December 27, 2018.

Procedure. Where, as here, the litigants are represented by counsel who are located well outside the district, the Local Rules and other guidance materials serve as a lingua franca of sorts, for how the respective court expects to receive the presentation of that litigation. It is not unreasonable to require that Plaintiff follow them. Put simply, these rules enable everyone, the near and the far, to participate equally. It is not unreasonable to require that Plaintiff follow them.

In light of the foregoing, and pursuant to F.R.C.P. 12(f)(2), BCS requests that the Court strike Plaintiff's Amended Complaint (Doc. 11).

Respectfully submitted this December 28, 2018.

s/ Brett P. Riley  
Brett P. Riley (**lead counsel**)  
General Counsel, BC Services, Inc.  
550 Disc Dr.  
Longmont, CO 80503  
(303) 532-3674  
[Briley@bcservice.com](mailto:Briley@bcservice.com)  
ATTORNEY FOR DEFENDANT

#### **CERTIFICATE OF SERVICE**

I hereby certify that on December 28, 2018 I electronically filed the foregoing **MOTION TO STRIKE AMENDED COMPLAINT** with the Clerk of Court using the CM/ECF system which will cause service to be accomplished to:

Kristen Wasieleski  
Consumer Law Partners, LLC

s/ Brett P. Riley \_\_\_\_\_